

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TORREY GRAGG, on his own behalf and  
on behalf of other similarly situated persons,

Plaintiff,

v.

ORANGE CAB COMPANY, INC., a  
Washington corporation; and RIDECHARGE,  
INC., a Delaware Corporation, doing business  
as TAXI MAGIC,

Defendants.

Case No. 2:12-cv-00576-RSL

**PLAINTIFF’S REPLY TO RESPONSE TO  
CROSS MOTION FOR PARTIAL  
SUMMARY JUDGMENT OR,  
ALTERNATIVELY, SUMMARY  
ADJUDICATION**

NOTED ON MOTION CALENDAR FOR  
OCTOBER 18, 2013

ORAL ARGUMENT REQUESTED

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1 In a Motion for Summary Judgment, Defendants ask the Court to rule that Ridecharge did  
 2 not use an automated telephone dialing system (“ATDS”) to send Mr. Gragg a text message even  
 3 though their dialing system has the proven capacity to send pre-programmed text messages to  
 4 millions of telephone numbers without human intervention. In so doing, Defendants ask the  
 5 Court to overrule or else ignore well over a decade of contrary FCC and Ninth Circuit precedent.  
 6 However, Defendants’ own witnesses and documents establish beyond any genuine dispute that  
 7 Defendants violated the TCPA. Defendants sent automated messages to promote Ridecharge’s  
 8 Taxi Magic app and services to numerous consumers who called Orange Cab just to order a  
 9 taxi—not to receive advertisements about the Taxi Magic. Such automated telemarketing is  
 10 exactly what the TCPA was enacted to prevent. Therefore, rather than grant Defendants’ Motion  
 11 for Summary Judgment, Mr. Gragg respectfully requests that the Court grant his Cross Motion  
 12 for Partial Summary Judgment or, alternatively, Summary Adjudication against Defendants.

13 **A. Undisputed Evidence Establishes that Ridecharge Used an ATDS under the TCPA**

14 Defendants do not dispute that Ridecharge used “a modem system” to send Mr. Gragg  
 15 the text message at issue. *See* Dkt. No. 84, Ex. 84, p. TM5104; Dkt. No. 86-2, pp. 188:4 –  
 16 189:15. Defendants also do not dispute that this modem system consisted of thirty-eight (38)  
 17 Model SF-100G MultiTech Systems cellular modems. *See* Dkt. No. 84, Exs. 71-72. Thus, when  
 18 determining if this modem system is an ATDS as defined by the TCPA, the Court can review  
 19 Ridecharge’s own manual for these modems to understand their capacities. *See id.*, Ex. 72.

20 Ridecharge’s manual makes clear that its modem system has the capacity to store long  
 21 lists of telephone numbers and then programmatically transmit text messages to any or all of the  
 22 stored telephone numbers. *E.g.*, *see* Dkt. No. 84, Ex. 72 at TM5308 (“What is SMS? Short  
 23 Messages through SMS (Short Message Service) can be sent to [m]obile numbers[,] [a]ny  
 24 person(s) from the address book[,] [and] [a]ny group(s) of persons created from the address book  
 25 or individual entries.”); *c.f. id.*, Ex. 72 at TM5319 (Users of the modem can “[s]et up broadcast  
 26 triggers (codes or words) that will send broadcast messages[...] [and] [c]ompose and save pre-  
 27 configured messages.”); *also see id.*, Ex. 72 at TM5275-5277, TM5285, TM5293-5294,

1 TM5310, TM5315-5320, TM5325, TM5344-5349; *and see* Dkt. No. 84, Ex. 58 at TM2080  
 2 (Ridecharge discussing transfer of telephone numbers to a MultiTech modem).

3 Defendants readily admit that Ridecharge utilized this programmatic capacity to create  
 4 and send dispatch notifications text messages with a rotating medley of advertisements. *See* Dkt.  
 5 No. 86-2, pp. 90:24 – 91:15, 92:13-17, 106:25 – 108:13, 201:8-9; Dkt. No. 61, Ex. 42 at  
 6 TM1003; Dkt. No. 84, Ex. 83 at TM1476; Dkt. No. 86-1, pp. 59:22 – 60:5. Ridecharge referred  
 7 to this programmatic element of their modem system as “SMS ‘code’”. *E.g.*, *see* Dkt. No. 61, Ex.  
 8 47 at TM1217. Therefore, there is no genuine dispute that Ridecharge’s code—not a human  
 9 being—created the text message which Mr. Gragg received and made sure it included one of  
 10 nine advertisements prepared for Orange Cab’s customers who called Orange Cab to order taxis.  
 11 *See* Dkt. No. 61, Ex. 48 at TM4931; *c.f.* Dkt. No. 60 ¶ 5; *and c.f.* Dkt. No. 14, ¶ 6.

12 Ultimately, Defendants themselves acknowledge that Ridecharge’s modem system  
 13 automated the transmission of millions of dispatch notification text messages like the one sent to  
 14 Mr. Gragg. *See* Dkt. No. 86-2, pp. 70:6-11, 102:12:15; Dkt. No. 61, Ex. 3 at OC84 (“Dispatch  
 15 Notification Allow Fleets to Automatically Notify Riders”), Ex. 4 at OC439 (“we’re powering  
 16 millions of Dispatch Notifications for our fleets”), Ex. 6 at OC438 (“this feature is an automated  
 17 system”), Ex. 43 at TM5126 (modems “send about 100k messages/month” for just one taxi  
 18 fleet); Dkt. No. 84, Ex. 64 (“[W]e’ve realized that 2500 messages/day is about the right number  
 19 for a single modem. At more than 3000 messages/day, the modem falls behind in peak times  
 20 yielding a less-than-optimal customer experience.”), Ex. 72 at TM5285 (noting a “Max Outgoing  
 21 Queue” of “4 MB” per modem). Defendants cannot and do not dispute any of the foregoing  
 22 evidence because they provided it by Rule 30(b)(6) deposition testimony and documents they  
 23 produced. Accordingly, Defendants’ own evidence establishes that Ridecharge used an ATDS to  
 24 send dispatch notification text messages to Mr. Gragg and Orange Cab customers like him.

25 1. Defendants Ignore Precedents which Establish that Ridecharge Used an ATDS

26 Notwithstanding the undisputed evidence which Defendants themselves provided,  
 27 Defendants argue that Ridecharge’s automated modem system might not be an ATDS under the

1 TCPA since it sends automated messages to lists of telephone numbers rather than to numbers it  
2 creates out of thin air. The FCC has long disagreed with Defendants' argument:

3 The TCPA defines an "automatic telephone dialing system" as "equipment which has the  
4 capacity (A) to store or produce telephone numbers to be called, using a random or  
5 sequential number generator; and (B) to dial such numbers." **The statutory definition**  
6 **contemplates autodialing equipment that either stores or produces numbers. It also**  
7 **provides that, in order to be considered an "automatic telephone dialing system,"**  
8 **the equipment need only have the "capacity to store or produce telephone numbers**  
9 **(emphasis added)...."** It is clear from the statutory language and the legislative history  
10 that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need  
11 to consider changes in technologies. In the past, telemarketers may have used dialing  
12 equipment to create and dial 10-digit telephone numbers arbitrarily. As one commenter  
13 points out, the evolution of the teleservices industry has progressed to the point where  
14 using lists of numbers is far more cost effective. **The basic function of such equipment,**  
15 **however, has not changed—the capacity to dial numbers without human intervention.**  
16 We fully expect automated dialing technology to continue to develop.

17 18 FCC Rcd. 14014, 14091-92 ¶ 132 (July 3, 2003) (italics in original; bold and underlines  
18 added). Defendants also fail to acknowledge that the Ninth Circuit relied upon this FCC ruling  
19 when it held that a predictive dialer was an ATDS under the TCPA because it could store lists of  
20 telephone numbers and had "the *capacity* to dial numbers without human intervention." *See*  
21 *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012) (emphasis  
22 added) *cert. denied*, 133 S. Ct. 2361 (U.S. 2013), *quoting* 18 FCC Rcd. at 14092 ¶ 132.

23 Accordingly, controlling FCC and Ninth Circuit precedents affirm that Ridecharge's  
24 automated modem system is an ATDS because (1) it can store telephone numbers, and (2) it has  
25 the capacity to dial those telephone numbers in an automated manner. *See* 27 FCC Rcd. 15391,  
26 15392 ¶ 2 n. 5 (Nov. 29, 2012) (an ATDS is "hardware that, when paired with certain software,  
27 has the capacity to store or produce numbers and dial those numbers at random, in sequential  
order, or from a database of numbers"), *citing* 18 FCC Rcd. at 14091-93 ¶¶ 131, 133; *see also*  
*Meyer*, 707 F.3d at 1043; *and see Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th  
Cir. 2009) ("[A] system need not actually store, produce, or call randomly or sequentially  
generated telephone numbers, it need only have the capacity to do it.").

## 28 2. The Court Should Follow the Precedents Ignored by Defendants

29 Ninth Circuit opinions like *Meyer* and *Satterfield* that adhere to FCC guidance on ATDSs  
30 are, of course, binding precedent which should be followed. *See Hart v. Massanari*, 266 F.3d

1 1155, 1170 (9th Cir. 2001) (“Binding authority must be followed unless and until overruled by a  
 2 body competent to do so.”). Moreover, the FCC opinions themselves are due deference because  
 3 “Congress has delegated the FCC with the authority to make rules and regulations to implement  
 4 the TCPA.” *Satterfield*, 569 F.3d at 953. For example, “[i]t is clear from the statutory language  
 5 and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking  
 6 authority, might need to consider changes in technologies.” 18 FCC Rcd. at 14091-92 ¶ 132; *also*  
 7 *see Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1129 (W.D. Wash. 2012) (“automated  
 8 dialing technology [expected] to continue to develop.”), *quoting* 23 FCC Rcd. 559, 566 (2008).  
 9 Therefore, the FCC’s descriptions of ATDSs are entitled to deference unless they are “arbitrary,  
 10 capricious, or manifestly contrary to the statute.” *See Satterfield*, 569 F.3d at 954, *quoting*  
 11 *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

12 Rather than being arbitrary, capricious, or manifestly contrary to the TCPA, the FCC’s  
 13 ATDS descriptions soundly comport to the remedial purpose of the statute. Congress enacted the  
 14 TCPA to limit the use of ATDSs because “telephone subscribers considered automated or  
 15 prerecorded telephone calls, regardless of the content or the initiator of the message, to be a  
 16 nuisance and an invasion of privacy[.]” 27 FCC Rcd. 1830, 1839 ¶ 24 (Feb. 15, 2012), *citing* 137  
 17 Cong. Rec. H11307 (Daily Ed. Nov. 26, 1991). And “[b]ecause the TCPA is a remedial statute, it  
 18 should be construed to benefit consumers.” *Gager v. Dell Fin. Servs., LLC*, --- F.3d ---, 12-  
 19 2823, 2013 WL 4463305, \*5 (3d Cir. Aug. 22, 2013); *see also Hason v. Med. Bd. of California*,  
 20 279 F.3d 1167, 1172 (9th Cir. 2002) (affirming the “familiar canon of statutory construction that  
 21 remedial legislation should be construed broadly to effectuate its purposes”), *quoting Tcherepnin*  
 22 *v. Knight*, 389 U.S. 332, 336 (1967). To a consumer, an automated message received is still an  
 23 automated message regardless of whether their telephone number was dialed from a stored  
 24 database or created out of thin air. Thus, the FCC’s description of ATDSs to include modern and  
 25 evolving automated dialing systems comports fully with the letter and purpose of the TCPA.

26 In sum, Defendants ask the Court to be the first federal tribunal in the country to rule that  
 27 the FCC erred with its practical description of an ATDS. Thus, Defendants want this Court to be

1 the first to hold that a device which has the capacity to send text messages in an automated  
 2 manner to lists of thousands or even millions of telephone numbers is not an ATDS under the  
 3 TCPA. However, in so doing, Defendants wrongly ignore controlling Ninth Circuit and FCC  
 4 precedent. The TCPA protects consumers from any automated telephone dialing system, even if  
 5 the system only has the capacity to make automated calls using lists of stored telephone numbers.  
 6 *See* 27 FCC Rcd. at 15392 n. 5; *Meyer*, 707 F.3d at 1043; *and* 18 FCC Rcd. at 14091-92 ¶ 132.  
 7 Therefore, Mr. Gragg respectfully asks the Court to rule that the undisputed facts establish that  
 8 Ridecharge's modem system, which was used to call Mr. Gragg, is an ATDS under the TCPA.

### 9 3. Ridecharge's Use of an ATDS is Not Excused by Orange Cab's Data Entry

10 Defendants further argue that their automated modem system might not be an ATDS as  
 11 defined by the TCPA because three humans were involved in providing some of the information  
 12 which Ridecharge's automated modem system used to generate and send text messages to Mr.  
 13 Gragg and other Orange Cab customers. Defendants contend that their automated modem system  
 14 could not send a text message unless (1) Mr. Gragg called Orange Cab to order a cab, (2) Orange  
 15 Cab's dispatcher entered Mr. Gragg's telephone number and location into Orange Cab's dispatch  
 16 system, and (3) an Orange Cab taxi driver pressed a button in his taxi to accept the ride. *See* Dkt.  
 17 No. 86-2, pp. 198:22 – 201:9, 210:13 – 211:19. However, Defendants admit that none of these  
 18 people created the text messages sent to Mr. Gragg and that none of these people actually  
 19 "dialed" Mr. Gragg's telephone number to send him the text message. *See id.*; *also see* Dkt. No.  
 20 86-1, pp. 94:24 – 95:3, 145:21 – 146:8. Thus, Defendants' real argument is that Ridecharge's  
 21 automated modem system might not be an ATDS because they programmed it to send a text  
 22 message after an Orange Cab taxi driver pressed a button to accept the ride order. Defendants err.

23 As a threshold matter, Ridecharge's modem system has the undisputed *capacity* to store  
 24 lists of telephone numbers and to broadcast text messages automatically to such stored lists of  
 25 telephone numbers. *See supra*, § A. This capacity, even if unused, is sufficient as a matter of law  
 26 to establish that Ridecharge employed an ATDS to transmit their text message to Mr. Gragg. *See*  
 27 *Satterfield*, 569 F.3d at 951 ("[A] system need not actually store, produce, or call randomly or

1 sequentially generated telephone numbers, it need only have the capacity to do it."). Therefore,  
2 Defendants cannot avoid TCPA liability by claiming that they did not take advantage of the full  
3 capacity of their automated equipment to transmit their text message to Mr. Gragg. *See id.*  
4 Nevertheless, the manner in which Ridecharge actually used its modem system proves that the  
5 modem system was an ATDS as defined by the TCPA.

6 Ridecharge's modem system has the capacity to broadcast text messages to lists of  
7 telephone numbers, even a list of just one telephone number, upon receipt of a programmatic  
8 trigger. *See* Dkt. No. 84, Ex. 72. As described by Ridecharge's own evidence, a taxi driver's  
9 acceptance of a ride order is programmed to be a triggering event which causes Ridecharge's  
10 modem system to receive a telephone number to which it automatically sends a text message;

11 When we have a technical integration to a fleet, we receive point-in-time "events" from  
12 the dispatch system. The dispatch system pushes us the information that taxi 123 just  
13 accepted order 789. We then deliver a DN to the phone number on order 789 - we have  
the phone number from when the order was put into the system, or we query the dispatch  
system to get it. We send the phone number to Twilio or to the SMS modem, depending  
on the fleet.

14 Dkt. No. 84, Ex. 66 at TM876; Dkt. No. 61, Ex. 29 at OC147 (a Ridecharge diagram which  
15 shows Orange Cab's dispatch system pushing data that is used to create and send text messages  
16 by Ridecharge's modem system). Defendants also concede that no human created or transmitted  
17 the specific text message sent to Mr. Gragg or anyone else. *C.f.* Dkt. No. 86-1, pp. 94:24 – 95:3,  
18 145:21 – 146:8; *and* Dkt. No. 86-2, pp. 198:22 – 201:9, 210:13 – 211:19.

19 In the end, the underlying legal question presented by Defendants actually is whether an  
20 automated modem system can be an ATDS under the TCPA even when it is programmed to use  
21 human-originated data or triggering events. However, Defendants fail to provide an example of  
22 *any* possible automated system that could operate without at least some human intervention to  
23 provide for its configuration, to input necessary databases or other parameters, to turn it on, etc.  
24 Despite science fiction horror stories that suggest otherwise, machines have not yet found a way  
25 to operate without at least some assistance from humans. Machines cannot plug themselves in,  
26 turn themselves on, and then tell themselves what to do. Therefore, in defining an ATDS, the  
27 TCPA focuses only on the capacity of hardware and software to engage in automatic telephone

**dialing**—not automatic data entry or triggering events. *E.g.*, see *Meyer*, 707 F.3d at 1043 (ATDSs have “the *capacity* to dial numbers without human intervention.”) (citation omitted); also see 27 FCC Rcd. at 15392 ¶ 2 n. 5 (an ATDS is “hardware that, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers”) (citation omitted).<sup>1</sup> Thus, the TCPA protects consumers from receiving an endless cacophony of automated messages on their cellular telephones without telemarketers first obtaining consumers’ express consent.

Under the TCPA, it is immaterial that Ridecharge’s automated modem system utilizes data and relies on triggers that might originate with humans. Because Ridecharge’s modem system had the capacity, which it used, to transmit text messages by automatically “dialing” the telephone numbers of Mr. Gragg and numerous other Orange Cab customers, there can be no genuine dispute that Ridecharge’s modem system is an ATDS as contemplated by the TCPA.

**B. Unopposed Expert Opinions Confirm that Ridecharge’s Modem System is an ATDS**

Despite having months to consider the declaration of Randall Snyder (*see* Dkt. No. 80), Defendants have failed to respond to this cross motion with any expert opinion on whether Ridecharge’s modem system is an ATDS. Defendants instead attempt to attack Mr. Snyder’s opinions by suggesting that he lacked foundation to opine on the capabilities of Ridecharge’s modem system because he did not inspect it physically. However, Defendants ignore that in rendering his opinions on how Ridecharge used an ATDS to send Mr. Gragg a text message, Mr. Snyder relied on the same deposition transcripts, the same declarations, the same exhibits, and even the same operations manual that have been filed with the Court on this issue. *See* Dkt. No. 80 ¶ 3. Accordingly, Defendants are wrong to move to strike Mr. Snyder’s declaration.

Ninth Circuit precedent stands against Defendant’s motion to strike. In *Satterfield*, 569 F.3d at 951, the Ninth Circuit relied on Mr. Snyder’s declaration that the system at issue “stored telephone numbers to be called and subsequently dialed those numbers automatically and

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<sup>1</sup> That no machine can be fully autonomous is the reason why the TCPA prohibits humans from using ATDSs instead of prohibiting ATDSs from using themselves. *See* 47 U.S.C. § 227(b)(1)(A).

1 without human intervention [and that] the use of stored numbers, randomly generated numbers or  
 2 sequentially generated numbers used to automatically originate calls is a technical difference  
 3 without a perceived distinction....” As reflected in the declaration cited by the Ninth Circuit, Mr.  
 4 Snyder came to these opinions without having physically inspected the system at issue. *See*  
 5 *Supplemental Declaration of Albert Kirby* (“*Supp. Dec. Kirby*”), ¶ 2, Ex. 1 ¶ 1. Like in the case  
 6 here, Mr. Snyder based his opinions upon deposition testimony and documentary evidence. *See*  
 7 *id.* Importantly, the Ninth Circuit overruled the district court’s disregard of Mr. Snyder’s  
 8 opinions, considered his opinions as material evidence, and used his opinions to reverse the  
 9 district court’s ruling on whether the defendant used an ATDS. *See Satterfield*, 569 F.3d at 951.  
 10 Because Mr. Snyder’s opinions had sufficient foundation for the Ninth Circuit in *Satterfield*, Mr.  
 11 Gragg respectfully submits that Mr. Snyder’s opinions have sufficient foundation here.

12 Mr. Gragg also respectfully asks the Court to disregard Defendants’ attempts to impugn  
 13 the credibility of Mr. Snyder’s opinions without themselves providing factual or legal  
 14 foundation. Most notably, Defendants critique Mr. Snyder’s opinions because he testified that an  
 15 iPhone could, under certain circumstances, be an ATDS. However, Defendants fail to  
 16 acknowledge that the iPhone and similar smart phones are powerful computers with processing  
 17 capabilities superior to that of most computers which were available when Congress enacted the  
 18 TCPA in 1991 over 22 years ago.<sup>2</sup> Reinforcing this reality, Judge Pechman of this District last  
 19 year held that it was plausible for a cell phone, when paired with certain software, to be an  
 20 ATDS. *See Hickey*, 887 F.Supp.2d at 1129-1130. Thus, by testifying how an iPhone can be made  
 21 into an ATDS, Mr. Snyder actually substantiates the fact that he is an expert in the subject  
 22 matter. Accordingly, Defendants’ attacks on the credibility of Mr. Snyder’s opinions are shown  
 23 to be toothless, having no foundation in technological reality or the law.

24 Of course, Mr. Snyder’s declaration might be superfluous for the present cross motion  
 25 given the undisputed evidence provided by Defendants. *See supra*, § A. Nevertheless, the

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26 <sup>2</sup> Mr. Gragg also respectfully asks the Court to take judicial notice that cell phones like the iPhone  
 27 are computers which are considerably more sophisticated and computationally powerful than the  
 computers which assisted Americans to travel safely to and from the moon in the 1960s.

1 declaration remains useful in that it is a cogent explanation which provides additional proof that  
 2 Ridecharge used an ATDS to send many millions of text messages to Mr. Gragg and consumers  
 3 like him. *E.g.*, *see* Dkt. No. 80, ¶¶ 11-17, 50-51, 66. Moreover, a more complete copy of the  
 4 transcript of Mr. Snyder's deposition, offered pursuant to Fed. R. Evid. 106, confirms that his  
 5 opinions are well-founded. *E.g.*, *see Supp. Dec. Kirby*, ¶ 3, Ex. 2 at 22:25 – 24:13, 26:19 – 31:9,  
 6 33:13 – 42:20, 49:14-19, 51:20 – 52:25, 54:2 – 62:16, 65:22 – 81:24, 87:12 – 88:11, 89:6-24.

7 The Ninth Circuit found a declaration by Mr. Snyder sufficient justification to make  
 8 precedent in defining an ATDS under the TCPA. Here, Mr. Gragg requests that the Court  
 9 consider Mr. Snyder's declaration not to make precedent—but to follow it. The expert opinion  
 10 testimony of Mr. Snyder confirms that Ridecharge's modem system is an ATDS.

### 11 **C. Orange Cab is Vicariously Liable for the Text Message Sent by Ridecharge**

12 Defendants do not dispute that Ridecharge made a call under the TCPA when its modem  
 13 system transmitted a text message to Mr. Gragg. Rather, Defendants argue that Orange Cab  
 14 cannot be vicariously liable for Ridecharge's "call" to Mr. Gragg. However, in making this  
 15 argument, Defendants wholly ignore the undisputed fact that Ridecharge was only able to send  
 16 the text message to Mr. Gragg because Orange Cab provided Mr. Gragg's telephone number and  
 17 taxi order information to Ridecharge's modem system through a connection with Orange Cab's  
 18 DDS dispatch system servers. *See* Dkt. No. 85-1, pp. 22:9 – 23:18, 22:23 – 23:5, 58:6-11, 85:4 –  
 19 87:12, 144:14-23; *cf.* Dkt. No. 84, Exs. 76, 80-81; *also see* Dkt. No. 85-2, pp. 204:11 – 206:19.  
 20 Orange Cab provided this information to Ridecharge's modem system through its DDS servers  
 21 for the express purpose of enabling Ridecharge to send automated dispatch notification text  
 22 messages to Orange Cab customers like Mr. Gragg. *See* Dkt. No. 85-1, pp. 44:8 – 45:5; Dkt. No.  
 23 61, Ex. 12. Thus, there is no genuine dispute that Orange Cab had actual, ultimate, *and* ostensible  
 24 control over whether Ridecharge obtained the information necessary to "call" Mr. Gragg.

25 Moreover, Defendants wholly ignore the recent FCC ruling which substantiates that  
 26 Orange Cab's conduct is sufficient to require Orange Cab to share Ridecharge's liability under  
 27 the TCPA for the text message transmission to Mr. Gragg. *See* 28 FCC Rcd. 6574 (May 9, 2013).

1 This recent ruling “establish[es] the operative legal standard for vicarious liability under the  
 2 TCPA[.]” *Mey v. Honeywell Int’l, Inc.*, CIV.A. 2:12-1721, 2013 WL 5150445, \*1 n. 2  
 3 (S.D.W.Va. Sept. 13, 2013). Because Orange Cab’s provision of Mr. Gragg’s telephone number  
 4 to Ridecharge was a necessary predicate to the text message being sent, the FCC makes clear that  
 5 Orange Cab shares Ridecharge’s TCPA liability for transmitting the text message to Mr. Gragg.  
 6 *E.g., see id.*, at 6592 ¶ 46 (“[A]pparent authority may be supported by evidence that the seller  
 7 allows the outside sales entity access to information and systems that normally would be within  
 8 the seller's exclusive control, including: access to [...] the seller's customer information.”).

9 **D. Defendants Failed to Obtain Mr. Gragg’s Express Consent Required by the TCPA**

10 Defendants do not dispute that “express consent” is an affirmative defense. *See Grant v.*  
 11 *Capital Mgmt. Services, L.P.*, 449 F. App’x 598, 600 n. 1 (9th Cir. 2011). Yet Defendants only  
 12 provide evidence that Mr. Gragg provided his telephone number to an Orange Cab dispatcher the  
 13 previous year when asked what “a good phone number or e-mail for me to contact you” would  
 14 be if Orange Cab found a passport which Mr. Gragg had lost. *See* Dkt. No. 94, Ex. 1 at 1. This  
 15 was not express consent for Ridecharge to send Mr. Gragg its telemarketing text message.

16 “Express consent is ‘consent that is clearly and unmistakably stated.’” *Satterfield*, 569  
 17 F.3d at 955 (emphasis added; citation omitted). Thus, express consent for one party to call is not  
 18 express consent for a third party call. *See id.* Moreover, the FCC has explained repeatedly that  
 19 express consent for one type of call does not include consent to receive other types of calls. *See*  
 20 27 FCC Rcd. at 1840 ¶ 25 (“Consumers who provide a wireless phone number for a limited  
 21 purpose—for service calls only—do not necessarily expect to receive telemarketing calls that go  
 22 beyond the limited purpose for which oral consent regarding service calls may have been  
 23 granted.”); 27 FCC Rcd. 15391, 15397 ¶ 11 (Nov. 29, 2012) (ruling that “a consumer’s express  
 24 consent to receive [opt-out] confirmation texts is limited to texts that [...] merely confirm the  
 25 consumer’s opt-out request and do not include any marketing or promotional information”); 23  
 26 FCC Rcd. at 564-65 ¶ 10 (ruling that a creditor can call a debtor about a debt “only if the  
 27 wireless number was provided by the consumer to the creditor, and that such number was

provided during the transaction that resulted in the debt owed") (emphasis added). All of these precedents illustrate how express consent is limited to consent which unambiguously stated.

Ultimately, Defendants fail to provide any evidence that Mr. Gragg provided any stated consent to receive any text message from Ridecharge. Accordingly, the call made by Ridecharge to Mr. Gragg's cellular telephone number occurred without his prior express consent

**E. If the Court Hears Defendants' Motion for Summary Judgment, then Justice Requires Hearing Mr. Gragg's Cross Motion for Partial Summary Judgment**

Defendants filed a Motion for Summary Judgment against Mr. Gragg's TCPA claim. *See* Dkt. No. 69. Mr. Gragg's present cross motion and reply brief together provide strong arguments of law and fact which explain why Defendant's Motion for Summary Judgment should be denied. *E.g.*, Defendant's cannot sustain their motion if it is possible for Mr. Gragg to prevail on his cross motion concerning the same subject matter. Nevertheless, Defendants attempt to invoke the "one-way intervention" rule to silence Mr. Gragg's full opposition to Defendants' dispositive motion. But in addition to defying fundamental fairness, Defendants' request misapprehends how the one-way intervention rule applies to the present case.

As a general rule, the question of whether a class will be certified should be resolved before the merits of an action are decided. [...] This procedural preference exists to protect defendants from the potential for "one-way intervention," whereby absent class members may choose to remain in the class if the decision on the merits is favorable to them, but may elect to opt out of the class if the decision on the merits is unfavorable. [...] **However, defendants may waive this procedural order, and may opt to have the merits of an action decided first.**

*Vander Luitgaren v. Sun Life Assur. Co. of Canada*, CIV.A. 09-11410-FDS, 2012 WL 5875526, \*1 n. 1 (D. Mass. Nov. 19, 2012) (emphasis added). Thus, when both defendants and plaintiffs have filed pre-certification cross motions for summary judgment, most courts to consider the issue have concluded "that resolution of the class certification issue can await the disposition of the parties' cross motions for summary judgment." *See Ahne v. Allis-Chalmers Corp.*, 102 F.R.D. 147, 151 (E.D. Wis. 1984) (a detailed analysis of one-way intervention as applied to dispositive cross motions); *White v. Bank of Am., N.A.*, CIV. CCB-10-1183, 2012 WL 1067657, \*4 (D. Md. Mar. 27, 2012) ("[I]n cases where the defendant has filed the potentially dispositive motion, the defendant has waived the procedural safeguards of Rule 23, limiting the possible impropriety of

1 an early decision on the merits, at least as far as the defendant's protections are concerned.”).

2 Though the Ninth Circuit has not taken a clear position on this issue, Defendants cannot  
3 dispute that the Ninth Circuit approved of the legal rationale for the D.C. Circuit opinion which  
4 affirms a pre-certification summary judgment sought and obtained by a plaintiff in a situation  
5 analogous to present circumstances. *See Schwarzschild v. Tse*, 69 F.3d 293, 297 (9th Cir. 1995);  
6 *c.f. Postow v. OBA Federal Sav. and Loan Ass'n*, 627 F.2d 1370, 1381-1384 (D.C. Cir. 1980).  
7 Moreover, as this Court recently stated, “the Court clearly has discretion to determine the course  
8 of these proceedings[...].” *Tavener v. The Talon Group*, C09-1370RSL, Dkt. No. 130 at 3  
9 (W.D. Wash. Sep. 27, 2012) (*see* Dkt. No. 85-1). Indeed, the Ninth Circuit holds that district  
10 courts have discretion to resolve merits issues prior to class certification “because the timing  
11 provision of Rule 23 is not absolute.” *Wright v. Schock*, 742 F.2d 541, 543 (9th Cir. 1984). But  
12 while the Court can choose to decide dispositive motions before or after class certification,  
13 fundamental fairness occurs only if the Court hears Defendants’ motion for summary judgment  
14 on the TCPA claim together with Mr. Gragg’s dispositive cross motion on the same claim.

15 **F. There is no Reason to Delay Mr. Gragg’s Cross Motion for Summary Adjudication**

16 The rationale of the one-way intervention rule rests upon a desire to avoid creating  
17 collateral estoppel in an unfair manner. *See Schwarzschild*, 69 F.3d at 295 (Noting “that one-way  
18 intervention had the effect of giving collateral estoppel to the judgment of liability in a case  
19 where the estoppel was not mutual.”) (citation omitted). This rationale—and therefore rule—  
20 does not apply to interlocutory orders such as the summary adjudication also sought by Mr.  
21 Gragg. *See Chaidez v. Progressive Choice Ins. Co.*, CV 12-03753 RSWL, 2013 WL 1935362, \*2  
22 (C.D. Cal. May 9, 2013) (“Absent a specific statute authorizing otherwise, a partial summary  
23 judgment under Rule 56(g) is not a final judgment but rather an interlocutory summary  
24 adjudication or a pre-trial order[.]”); *c.f. Weule v. Nordstrom (In re Nordstrom)*, 8 Fed. Appx.  
25 823, 828 (9th Cir. 2001) (“[W]e cannot give collateral estoppel effect to this interlocutory order  
26 because there was no final judgment on the merits[...].”). Accordingly, there is no reason to  
27 delay hearing Mr. Gragg’s alternative Cross Motion for Summary Adjudication.

1 RESPECTFULLY SUBMITTED: October 18, 2013

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**DECLARATION OF SERVICE**

I, the undersigned, certify that, on this date, a true copy of the foregoing document will be or has been served on the persons listed below in the manner shown:

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